Supreme Court, U. S.
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No. 80-27

In the
Supreme Court of the United States

OCTOBER TERM, 1980

DAVID DEVOTO and CHARLES F. VOLK,
Petitioners,

vs.

PACIFIC FIDELITY LIFE INSURANCE CO. and
BANKERS MORTGAGE COMPANY OF CALIFORNIA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Respondents' Brief in Opposition

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Respondents Pacific Fidelity Life Insurance Company and Bankers Mortgage Company of California respectfully request that this Court deny the petition for writ of certiorari, seeking review of the judgment and opinion of the Court of Appeals for the Ninth Circuit, reported at 618 F.2d 1340.

REASONS FOR DENYING THE WRIT

1. Neither of the Questions Presented in the Petition Was Raised Below.

The petition seeks to present two questions for review: first, whether respondents' alleged conduct should have

been judged by *per se* analysis rather than the rule of reason; and second, whether reversal of the jury verdict in favor of petitioners denied them the right to trial by jury.

Neither question was presented to the District Court or the Court of Appeals. Both are raised for the first time in these proceedings in the petition to this Court.

It has long been the policy of this Court not to review questions not raised below, absent "exceptional circumstances." *United States v. Lovasco,* 431 U.S. 783, 788 n.7 (1977). No exceptional circumstances are suggested by the petition. Indeed, the protracted course of the proceedings below and in this Court, as detailed at pages 3-5 of the petition, confirms precisely the opposite. If petitioners seriously believed *per se* analysis had any application to this case, they had many opportunities to urge it during the past ten years:

1. 1970, opposition to motion to dismiss;
2. 1972, opposition to motion for summary judgment;
3. 1974, opening and reply briefs to the Ninth Circuit in first appeal;
4. 1975, opposition to petition for rehearing;
5. 1975, opposition to petition for certiorari;
6. 1976, trial brief and proposed jury instructions;
7. 1976, brief in opposition to post-trial motions;
8. 1977, brief to the Ninth Circuit in second appeal;
9. 1980, petition for rehearing.

The use of rule of reason analysis in the 1975 opinion of the Ninth Circuit in the first appeal (516 F.2d 1),* coupled

*Appendix "B" to the petition is not, as represented at p. 2, a copy of the Ninth Circuit's reported opinion, in that it does not reflect that court's substantial modifications to the opinion on petition for rehearing.

with petitioners' acquiescence in that approach until the filing of their petition, underscores both the particular necessity for a showing of "exceptional circumstances" in this case and the stark absence of any attempt at such a showing in the petition.

2. The Decisions of This Court and the Courts of Appeals Uniformly Apply the Rule of Reason to the Type of Conduct Alleged by Petitioners.

The 1975 decision of the Ninth Circuit in the first appeal in these proceedings clearly stated as the issue for trial whether "the defendants intended to, or did, unreasonably restrain trade in violation of § 1 of the Sherman Act." 516 F.2d at 6-7. Petitioners' belated effort to fashion a new *per se* rule runs directly counter to the careful process by which this Court has considered additions to the list of *per se* offenses in the past. The market effect and economic consequences of challenged conduct have long been held to be the key to creation of new *per se* categories, *e.g., Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49-59 (1977); *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 178 (1965); *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963). It is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act, *e.g., Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 9-10 (1979); *United States v. Topco Associates*, 405 U.S. 596, 607-08 (1972).

Here, not only was the market effect of the specific conduct challenged by petitioners stipulated by them to be just slightly over 1% (618 F.2d at 1345); in addition, the courts have indeed had "considerable experience" with the general type of business relationship challenged by petitioners (dealings between noncompeting affiliated corpora-

tions) and have consistently found them to be *reasonable.* Far from showing any conflict between the decision below and those of this Court or the other circuits, the uniform result of considerable judicial exposure to such intracorporate dealings has been to deny them any antitrust significance even under rule of reason analysis. *See, e.g., United States v. Columbia Steel Co.,* 334 U.S. 495, 523, 525 (1948); *United States v. Yellow Cab Co.,* 332 U.S. 218, 227 (1947); *Gough v. Rossmoor Corp.,* 585 F.2d 381, 385-89 (9th Cir. 1978), *cert. denied,* 440 U.S. 936 (1979); *Martin B. Glauser Dodge Co. v. Chrysler Corp.,* 570 F.2d 72, 83-84 (3d Cir. 1977), *cert. denied,* 436 U.S. 913 (1978); *Knutson v. Daily Review, Inc.,* 548 F.2d 795, 801-04 (9th Cir. 1976), *cert. denied,* 433 U.S. 910 (1977); *Mutual Fund Investors v. Putnam Management Co.,* 553 F.2d 620, 626 (9th Cir. 1977); *Ark Dental Supply Co. v. Cavitron Corp.,* 461 F.2d 1093, 1094 (3rd Cir. 1972); *Beckman v. Walter Kidde & Co.,* 316 F.Supp. 1321, 1326 (E.D.N.Y. 1970), *aff'd per curiam,* 451 F.2d 593 (2d Cir. 1971), *cert. denied,* 408 U.S. 922 (1972); *Jos. E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.,* 416 F.2d 71, 81-82 (9th Cir.), *cert. denied,* 396 U.S. 1062 (1969); *Syracuse Broadcasting Corp. v. Newhouse,* 319 F.2d 683, 687 (2d Cir. 1963).

Petitioners' reference to reciprocity and tying cases does not aid their attempt to fashion a new *per se* category. Both reciprocity and tying involve use of market power in one market to influence competition in a second market. This case in contrast involves a single market in which respondents lacked market power and in which petitioners stipulated to a *de minimis* effect on competition.

No reason for sudden departure from a uniform history of rule of reason analysis is shown by the petition or record in this case.

3. Reversal of a Jury Verdict for Failure of Proof Does Not Deny the Right to a Jury Trial.

Petitioners apparently urge that they were denied the right to a jury trial because the Court of Appeals reversed the jury verdict in their favor. The sole argument in support of this reason for granting the writ is a recitation of 37 cases over the past decade in which jury verdicts for antitrust plaintiffs have been vacated or reversed. Far from demonstrating any merit in petitioners' position, the 37 cases serve only to illustrate that, consistent with the Seventh Amendment, courts across the country perform their duty to review jury verdicts and overturn them when the evidence is insufficient or lower courts have improperly applied the governing principles of law to the facts. *See Galloway v. United States,* 319 U.S. 372, 389 (1943); *New York Times Co. v. Sullivan,* 376 U.S. 254, 285 n.26 (1964). The Ninth Circuit's proper discharge of that duty here neither offends the Seventh Amendment nor presents any reason for granting the writ.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Dated: August 6, 1980.

Respectfully submitted,

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